No. 3962

United States Circuit Court of Appeals

For the Ninth Circuit

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW, and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a Corporation,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Oregon.

ISHAM N. SMITH,
418 Mohawk Building,
Portland, Oregon,
Attorney for Appellant.

Metropolitan Press, Portland

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STATEMENT OF FACTS

J. B. C. Lockwood, appellant, brought this suit in the district court for Oregon against the above defendants seeking temporary and permanent injunctions restraining the defendant City and its council from passing certain ordinances vacating designated portions of East 8th and Clackamas streets in Holladay's addition, Portland, upon the petition of the remaining defendants; and preventing appellee Oregon Real Estate Company from breaching its covenants in a deed from it to appellant, which conveyed to appellant certain lots, in such addition, as per plat, and thereby also conveyed as we claim, private easements and rights of way over the area in contest; also, restraining that company and

appellee School District from destroying appellant's easements, and appropriating the area in controversy to purposes destructive of public streets and private easements.

The lands embraced in Holladay's Addition were platted by George W. Weidler as trustee, by plat dated, acknowledged and recorded on December 17, 1870, in book M of deeds at page 302, and book I of plats, page 72, of records of Multnomah County; and, thereafter the blocks, streets and alleys designated on said plat were rededicated by deed and plat of dedication executed by Samuel M. Smith, J. H. Mitchell and George W. Weidler, and recorded on February 1, 1871, in book M of deeds at page 634, and book 1 of plats at page 73, records of Multnomah County (Tr. pp. 10, 11).

The validity of these plats was sustained and the rights acquired by purchasers of property thereunder were settled in

> Steel v. City of Portland, 23 Or. 176. (182-184, per Bean, J.),

Appellee Oregon Real Estate Company, by deed dated, acknowledged and recorded June 19, 1872, in book S of deeds at page 327 of the records of Multnomah County, acquired a large portion of Holladay Addition as per plat, including the parts in controversy (Tr. pp. 12-14); complaint, allegation VI); and thereafter it deeded to appellant Lockwood by warranty deed dated, acknowledged and recorded April 6, 1908,

> "all of lots numbered one (1), two (2), seven (7)

> and eight (8), in block number ninety-nine (99) Holladay's Addition to East Portland now incorporated in the City of Portland, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining",

subject to certain conditions (plaintiff's Exhibit "G", Tr. pp. 73-76).

More than fifty years after the dedication of the plat and the public use of the streets shown thereon, and on September 9, 1922, the appellee School District petitioned the defendant City for vacation of designated portions of Clackamas and East 8th streets shown on the plat.

Its petition was filed September 15, 1922, and was accompanied by the consent of certain property owners, to-wit, the appellee School District No. 1, the appellee Oregon Real Estate Company, and Fred Jennings, who asked for the vacation of portions of East 8th street; and by the consent of appellee Oregon Real Estate Company and appellee School District No. 1, as to portions of Clackamas street (plaintiff's Exhibits "B", "C" and "D", Tr. pp. 43-49, all marked filed September 8, 1922).

By section 362 of the former Charter of Portland—(in effect now as an ordinance)—(Tr. pp. 28-33) the person or corporation desiring vacation of any street or part thereof is required to publish notice by advertising for four consecutive weeks in the city official newspaper that at a regular meeting of the council of said city to be had at the time stated in such notice a petition will

be presented to the council praying for the vacation of such street or portion thereof, particularly describing the same.

Such publication was made from August 10, 1922, to September 7, 1922, both dates inclusive (Tr. 49), and the matter came on for hearing at the regular meeting of the council on September 13, 1922, at which certain objections and remonstrances filed against granting the prayer of such petitions were denied and overruled (Tr. p. 51) and the praper of the petition was granted in its entirety. Thereupon, the ordinances vacating those portions of each street were introduced before the City Council (Tr. pp. 52, 53, also 56, 57).

These ordinances were read the first and second times on September 15, and the third time on September 27, 1922, and were thereupon unanimously passed.

Both petitions for vacation state with appropriate change of description, substantially,

> "That the purpose for which the ground is proposed to be used, which your petitioner herein seeks to have vacated, is for general private purposes the same as the adjacent ground, and particularly for residential purposes and school purposes.
>
> "That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the west, being Block 96, the said School District contemplates the purchase of Blocks 95, 97 and 98 of Holladay Addition, and on which the proposed new Holladay School is to be located and the vacation of that

portion of said street will add to and be beneficial to the public in connection with said school."

The complaint alleges that appellee Oregon Real Estate Company owns Blocks 95, 97 and 98 of Holladay Addition and has entered a contract to sell said blocks and portions of both streets to appellee School District upon the condition precedent that the designated portions of each street shall first be vacated so that the Real Estate Company may become reinvested with title thereto and may transfer them with designated blocks to the School District.

It is charged that the vacations sought do not rest in public necessity; that neither portion of either street is dangerous to travel nor unfit for use nor has been abandoned by the public; that the City of Portland has means with which to keep up said portions of said streets; that no public interest requires the vacation of either portion of said streets; that neither portion of either street is now or ever was a menace to the public health, and public welfare, or the public safety, and that each portion of each street is hard surfaced, is in first class condition of repair, is safe for travel, is needed for travel, is used by the public generally as a means of egress and ingress for transportation and as thoroughfares for passage from various parts of the City of Portland to other parts thereof; that such portions of each of said streets are not inherently dangerous but are safe; are much used by the inhabitants of Portland generally, and more especially by the residents of Portland who have built homes within and who resided within the limits of Holladay Addition (Tr. p. 19).

The original complaint (Tr. pp. 5-58) was filed on September 23, 1922, prior to the final passage of the ordinances. All defendants were duly served, but the Oregon Real Estate Company has never appeared in the cause.

The City and the School District filed their motions to dismiss the original bill (Tr. pp. 61-65) and upon hearing the court refused the temporary injunction sought by plaintiff.

Thereafter the ordinances were passed, and thereafter on October 17, 1922, plaintiff filed his amendment to his bill (Tr. pp. 66-77) and his supplemental bill (Tr. 77-84), setting out more fully his original rights, showing the passage of the ordinances, asserting his rights under his deed, and stating that after his purchase of his property and upon reliance of his rights *under the deed and plat as an entirety* he expended thousands of dollars in improving the property, and also in hard surfacing the streets of Holladay Addition.

The City and the School District again filed motions to dismiss (Tr. pp. 84-88) which upon hearing were thereafter sustained, and decree of dismissal was entered. (Tr. p. 89.)

The appellant alleges that he acquired by virtue of his deed (Exhibit "G", Tr.. pp. 73-76), not only the specific lots described therein, but also as appurtenant thereto, every easement, privilege and advantage which the plat or map represents as part thereof; furthermore, that in addition to his public rights to the streets shown on the plat he has an easement or private right

of way by deed thereover; that appellee Oregon Real Estate Company is estopped from signing the petition for vacation because it sold him his lots under the plat, and appellee School District is estopped because it has the same rights under the plat as he claims.

Appellant alleges that the street vacation is for private purposes to enable Oregon Real Estate Company to sell the property vacated, with certain abutting blocks, to the School District, for use for school purposes; that such vacation and the use of the streets for school purposes will deprive him of the use of such property not only as a public street but will take from him his private easements; that the whole proceeding violates his rights under the due process and equality clauses of Article XIV, Section 1, and the contract clause of Article I, Section 10, of the Federal Constitution, as well as the clause prohibiting appropriation of private property for public use without compensation, under Article I, Section 18 of the Oregon Constitution.

Appellant seeks to prevent the construction of buildings over the designated portion of said streets, to restrain the appropriation of such streets to purposes destructive of his rights therein, and to keep title to his easements and rights of way, and seeks general relief.

As above noted, the court dismissed the bill and made no order transferring the cause to the law side.

Appellant relies upon the following errors (Tr. pp. 93, 97):

The Court erred

I.

In holding and deciding that the motions to dismiss the above cause on the original complaint, as well as the amendment to the complaint and supplementary complaint, were well taken.

II.

In dismissing said cause upon the motion of defendants, the City of Portland and its respective officers, George L. Baker, Mayor, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor.

III.

In dismissing said cause on the motion of defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, and its directors, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering.

IV.

In not overruling said motions and each of them and in refusing to issue the injunction prayed for in said cause, for the following reasons:

(a) Plaintiff, J. B. C. Lockwood, purchased property described in the complaint according to the recorded plat of Holladay's Addition, Portland, Oregon;

(b) By such purchase he acquired a private ease-

ment and right of way over, along and across all of the streets and thoroughfares designated on said plat;

(c) Defendant City of Portland and its officers, and defendant School District No. 1 and its officers, and defendant Oregon Real Estate Company, have conspired together to take from plaintiff his rights of way and easements over and across the designated portions of the streets vacated, without compensation, without public necessity, and contrary to law, and in violation of the rights of plaintiff guaranteed by both the state and federal constitutions as set forth;

(d) This suit to quiet plaintiff's title in and to the designated portions of streets in controversy is his only remedy; damages at law are not compensatory;

(e) By plaintiff's deed he acquired private rights of way over and along said streets and all of them, and private rights of ingress and egress to and from his property described in the complaint, which is a different property right from that of the general public in said streets and highways, and is a private property right of plaintiff; and by the proceedings complained of defendants and each of them have sought to take and by the decree of the Honorable District Court they are permitted to take the private property rights of this plaintiff in real estate without compensation, and without public reason or necessity.

(f) The ordinances of the City of Portland purporting to vacate said streets are, and each of them is, void as to the private right of this plaintiff sought to be enforced by this proceeding..

V.

In sustaining the motion of defendants to dismiss said cause and in holding and deciding that the complaint did not state facts sufficient to constitute grounds for relief in equity, and in holding and deciding that plaintiffs remedy, if any, is at law, and in dismissing said bill.

Appellant relies for reversal upon the following

POINTS AND AUTHORITIES

POINT 1

Where an owner of land plats the same into lots, blocks and streets, and sells lots with reference to that plan or map, the purchaser of a lot under such plat acquires as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the dedicated tract.

> Rowans Ex'rs v. Portland (Ky.), 8 B. Munroe, 232, 237.

The above citation is a leading American authority upon the subject and illustrates the reasons for the rule. The principles as there stated have been adopted as the law of Oregon.

Carter v. City of Portland, 4 Or. 339, (346 et seq).

Nicholas v. Title & Trust Co., 79 Or. 226; 154 Pac. 391; Ann. Cas. 1917 A, 1149 (1154), (collating Oregon cases).

McCoy v. Thompson, 84 Or. 141 (collating Oregon cases).

And such is the general law as applied by both state and federal courts.

19 C. J. 928, Sec. 127, and cases.

See also

Gormley v. Clark, 134 U. S. 338; 33 L. 909.

Cox v. Hart, 145 U. S. 376; 36 L. 741.

Jeffries v. East Omaha Land Co., 134 U. S. 178; 33 L., p. 872.

Central Trust Co. v. Hennon (6th C. C. A.), 90 Fed. 593.

Paine v. Consumers Trust Co. (6th C. C. A., per Taft, J.), 71 Fed. 626.

London and S. F. Bank v. Oakland (9th C. C. A., per Hawley, J.), 90 Fed. 691.

Davenport v. Buffington (8th C. C. A., per Sanborn, J.), 97 Fed. 234.

POINT 2

The lot owner's private right so acquired is separate from and survives the extinction of the public right. He holds rights of way over every street on the plat as easements, appurtenant to his lots.

Van Buren v. Trumbull (Wash.) (per Chad-

wick, J.), 92 Wash. 691; 159 Pac. 891; L. R. A. 1917 A 1120 (extended note).

In the Washington case the court says:

> "No cases going to the exact state of facts with which we have to deal have been cited by counsel, nor have we, after considerable search been able to find any. Resort must be had to fundamental principles."

Although the Washington court deplores the paucity of authority, the annotator cites numerous cases sustaining the rules, but omits the following:

Sandstrom v. O.-W. Etc. Co., 75 Or. 159, 162, 165, says:

> "Having purchased the property with reference to the dedicated streets appearing on the plat, the plaintiff was entitled to the use of those highways as an appurtenance to his premises * * * *but, as he passed along the street with other members of the general public he had a privilege which no other person possessed, to-wit, that of entering upon his close from that street, and prior to the construction of the road in the exercise of his prerogatice he could approach his premises from the east as well as from the west, etc.*" (Italics ours.)

Steel v. City of Portland, 23 Or. 176;
Gormley v. Clark, 134 U. S. 338; 33 Law 909, says:

> "Whether the plat was a statutory plat, or not, as to which some issue is made by the answer, the proofs establish such a dedication as created an easement in the petitioner, the existence of which

Gormley was estopped to deny, and which the court was justified in protecting (citing cases). *The right of way as appurtenant to those blocks and lots passed to the purchasers under the sale upon the trust deed, etc.*" (Italics ours.)

Central Trust Co. v. Hennen, 90 Fed. 593 (596), 6 C. C. A., says:

"(596) It is very clear that the action of the Hancock County Court in discontinuing the state road as a public highway could have no effect on any right of way vested in her by contract or otherwise independently of any action of said county court in establishing or maintaining the road as a public highway."

Paine v. Consumers F. & S. Co., 71 Fed. 626 (628), 6 C. C. A. (per Taft, J.)
Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56.
19 C. J. 933, Sec. 135, says:

"But according to the better opinion if a road is a public highway the easement so granted survives the extinguishment of the public easement by the discontinuance of the highway by act of law; *for these private easements are independent of the public easement and are in their nature as indestructible by acts* of the public authorities *or of the grantor of the premises as is the estate itself which is the subject of the grant.*" (Italics ours)

See also McCoy v. Thompson, 84 Ore. 141 (147).

The dedicator, the owner or the vendor who sells lots according to a plat is estopped from denying the private easement as well as from doing anything contradictory

to or destructive thereof. The purchaser's rights of private easement rest in contract, and the covenants of the deed protect the purchaser as against any act by the dedicator, the vendor or the owner conflicting therewith.

Paine v. Consumers F. & S. Co., 71 Fed. 626 (6 C. C. A.) says (Per Taft, J.):

> "(71 Fed. 628) In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed (citing cases). It is quite true that it has been held that such a deed does not bind the grantor to open and maintain a street in a condition fit for travel (cases); nor does it imply a covenant that the street is in such a condition when the deed is made. *The only effect is that, as between the grantor and the grantee, the latter may do nothing inconsistent with this right. Between them, therefore, it is a street.*" (Italics ours.)

Steel v. City of Portland, 23 Or. 176 (at 183), construing the plats in question, says (Per Bean, J.):

> *"The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which the lots are sold* (citing Oregon cases)." (Italics ours.)

Gormley v. Clark, 134 U. S. 338; Book 33 L. 909 at 914 says:

"Whether the plat was a statutory plat or not, as to which some issue is made by the answer, the proofs establish such a dedication as created an easement in the petitioner, the existence of which Gormley was estopped to deny and which the court was justified in protecting."

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56 (at 58), says:

"The owner is estopped to deny the existence of the dedication whenever private rights intervene. * * * The sale and conveyance of lots according to the plat imply a covenant that the streets and other public places indicated on the plat shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use. * * * Deeds made with reference to such plat will estop the owner to deny the existence of a dedication. * * * *Equity* will not permit such an injustice but *will enforce,* at the suit of individual lessees to whom rights and privileges have been granted by the deeds creating their terms, *the implied covenant in their leases against any act of the grantor which shall interfere with the free use by the public of the public grounds."* (Italics, ours.)

Christian v. Eugene, 49 Or. 170 (at p. 173) says:

"The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest."

Oregon City v. O. & C. Ry. Co., 44 Or. 165 (176) (Bean, J.) says:

"When, therefore, the Harveys, after acquiring

title from the State, without making any change or alteration in the McLoughlin map, sold and conveyed lots with reference thereto, they thereby ratified, approved and dedicated to the public the streets, alleys and public places shown thereon, as completely and fully as if they had themselves made and formally acknowledged the map."

And at pp. 178-9 the court says:

"The dedication is binding on the donors and their successors in interest, and can only be revoked by them when the purpose for which it was made has entirely failed. 'It would be unreasonable and unjust,' says Mr. Chief Justice Thayer, 'to allow a town proprietor to revoke the dedication of any street indicated upon the plat of the town for the reason that the corporate authorities of the town had not specially accepted it as a street, nor the public actually entered upon and used it as such. *The proprietor proposed to the public in the outset that the ground represented as the street should forever remain open to be used for that purpose, and upon a sale of lots and blocks by reference to such plats he precluded himself from making any other or different disposition of it.*" (Italics, ours.)

Jacobs Pharmacy Company v. Luckie (Ga.),

Ann. Cas. 1917 A, p. 1105,

has an extended note collating authorities from all the State and Federal Courts. Discussing the rule in Oregon the author says (p. 1136):

"And likewise the sale and conveyance of lots with reference to a plat of the town laid out by a prior owner, amounts to a ratification, approval and dedication to the public of the streets, alleys and public places shown thereon as completely and fully

as if the subsequent owners of the property had themselves made and formally acknowledged the map."

POINT 3

The Oregon Real Estate Company joined in procuring vacation of both portions of both streets (Tr. pp. 49 and 49). Such acts conflict with its own deed to plaintiff. By such proceedings it seeks to devote the property to purposes other than street purposes, and hence it was and is estopped from participating in such vacation.

Extended Note, Ann. Cas. 1917 A, p. 1109, collating Federal and state cases and discussing Oregon rule at p. 1136.

By estopping the Oregon Real Estate Company as a consenting owner, the remaining consentors are insufficient under the charter (Tr. pp. 28-29) and the entire proceedings are void.

POINT 4

The petitions, ordinances and vacation proceedings are void because they show no public necessity for such vacation; but, on the contrary, they both show the purpose of the vacation is for private, residential and school purposes.

37 Cyc. 179.
McQuillan Minn. Corp. (Ed. 1912), Vol. 3, Sec. 1403, p. 2985.
Portland Charter, Sec. 52 Subd. 12 (Tr. p. 26).

Portland Charter, Sec. 362 (now an ordinance), (Tr. pp. 28-29).

POINT 5

The petition for vacating 8th street did not have sufficient signers under the charter.

The requirement is that in measuring the area affected by the vacation, an extension of two hundred feet from either termini of the vacated street is included and that two-thirds of the property owners on both sides of the street must sign the petition.

In the case of 8th street this was not done.

POINT 6

Equity has jurisdiction in this case and injunction is the proper remedy.

Tooze v. Ry. Co., 77 Or. 157.
Nicholas v. Title & Trust Co., 79 Or. 226 (Syllabus Point 1).
Bostwick v. Hosier, 97 Or. 125 (190 Pac. 299).
19 C. J. 992, Sec. 253, also p. 996, Sec. 258.
Gormley v. Clark, 134 U. S. 338; 33 L. 909.
Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56.

POINT 7

The authorities apparently conflict upon the question of the right of a lot owner to an easement over all the streets shown upon the plat. Some hold that lot owners have such rights of way over such streets only

as are necessary for use in connection with their particular property; others hold that the lot owner acquires an easement over every street shown on the plat.

The apparent conflict is soluble by keeping in mind the rule of unity between plat and deed, by which all rights conferred by the plat are treated as a unit with the deed. Under this *"unit rule"* the purchaser's rights include every street in the plat.

Rowans Ex'rs v. Portland, 8 B. Monroe, 232.
Carter vs. City of Portland, 4 Or. 339.
Steel v. City of Portland, 23 Or. 176, 31 Pac. 479.
19 C. J. 931, Sec. 130.
Sandstrom v. O-W. R. & N. Co., 75 Or. 159.
Morse v. Whitcomb, 54 Or. 412, Point 12.
Bostwick v. Hosier, 97 Or. 125, 190 Pac. 299.

POINT 8

Aside from the question of public rights to public streets, the case involves the protection and enforcement of private rights acquired under the deed from appellee Oregon Real Estate Company to appellant (Ex. "G," Tr. p. 73), as appurtenant to the lots conveyed.

Such rights are cognizable in and are enforced and protected by courts of equity, by appropriate remedies.

Extended note, Ann. Cas. 1917 A, p. 1109, collating Oregon cases at p. 1136.
Tooze v. Ry. Co., 77 Or. 157.

Nicholas v. Title & Trust Co., 79 Or. 226.
McCoy v. Thompson, 84 Or. 141.
Bostwick v. Hosier, 97 Or. 125 (190 Pac. 299).
McFarland v. Lindekugel (Wis.), 83 N. W. 757 (758).
Hall v. Breyfogle (Ind.), 70 N. E. 883, Point 7. (Unity rule.)
Smith v. Garbe, 86 Neb. 91; 124 N. W. 921; 136 Am. St. 674 (679—the question stated).
Stevenson v. Lewis (Ill.), 91 N. E. 56.
La Bounty v. Seattle (Wash.), 89 Pac. 481.
37 Cyc. 192, par. (e).
28 Cyc. 840, 841.
Providence Steam. Eng. Co. v. Providence S. S. Co., 12 R. I. 348; 34 Am. Rep. 652.

POINT 9

The charter provisions, petition, ordinances and acts of vacation are void,

(a) For conflict with appellant's rights under the equality and due process clauses of Article XIV, Sec. 1, and the contract clause of Article I, Sec. 10 of the Federal Constitution.

Penn. Coal Co. v. Mahon, 43 Sup. Ct. Rep. 158 (Published Jan. 15, 1923).
Smith v. Cameron (Ore.) 210 P. 716 (adv. sheets Jan. 8, 1923).
Hill v. Standard Min. Co., 12 Idaho 223 (at 239) quoting.
Drake, Ex. v. Lady Easley Coal Co., 102 Ala.

501; 48 Am. St. 77; 14 So. 749; 24 L. R. A. 64, says:

"It is further said: 'Under the provisions of the constitution, private property cannot be taken for public use or for corporations, without just compensation being made to the owner, except by consent. The courts—and it was never intended to be otherwise understood—are not 'masons' to 'chisel' away vested rights of property of private individuals, however humble or obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his country."

(b) Because of an attempted appropriation of private easements for private purposes, without compensation.

Tooze v. Ry. Co., 77 Or. 157; 150 Pac. 252, 254, holding that the protection extends to easements over streets, and to small, as well as large, rights.

Myres v. Clackamas County, 98 Or. 391, Point 3.
Pac. El. Co. v. Portland, 65 Or. 349, Point 18.
Bostwick v. Hosier, 97 Or. 125, 190 Pac. 299.

(c) Because the whole proceedings for vacation are an attempt, indirectly, to amend the plat, as against purchasers.

Myers v. Clackamas County, 98 Or. 391.
Miller v. Fishers, 90 Or. 111 (at p. 114),

and to avoid condemnation proceedings, as required by State and Federal Constitutions.

Penn. Coal Co. v. Mahon, 43 Sup. Ct. Rep. 158. (Published Jan. 15, 1923.)
Tooze v. Ry., 77 Or. 157.

(d) And are violative of Art. XI, Sec. 4, Oregon Constitution and Secs. 7108 et seq. Ore. Laws, because no provision is made at any stage of such proceedings to compensate Lockwood for his destroyed easements.

POINT 10

The lower court held that plaintiff's remedy, if any, was at law for damages, and dismissed the bill. This is error; because, if true, the cause should have been transferred to the law side.

Federal Equity Rule, 22.
Hopkins Fed. Eq. Rules, 3rd. Ed., pp. 162-4 (Cases).

ARGUMENT

The appellant bases his claim of right upon the dedicated plat showing, as it does, the various streets, thoroughfares and highways in Holladay's Addition, and his deed (Tr. p. 73, plaintiff's Exhibit "G") conveying certain lots with reference to the plat.

POINT 1

UNITY RULE

The authorities heretofore cited hold that where a deed refers to a plat for description of the property conveyed, the deed and plat are one instrument, and every right, privilege, advantage and easement shown on the plat is appurtenant to every lot sold with reference thereto.

Under this unity rule a lot purchaser acquires rights of way and easements over every thoroughfare and street shown upon the plat, and is not limited to those immediately surrounding or convenient for approach to his property.

One of the leading cases in America upon this subject is

> Rowan's Ex're v. Portland, 8 B. Munroe 232 (47 Ky.).

It says:

> "This map, therefore, is to be assumed as the

representation of the town in which the lots were sold; and not as a merely verbal, but as a written and recorded representation of its localities and divisions, its streets, alleys, thoroughfares, commons and public grounds, so far as they are indicated by it. In all these respects it is to be regarded as having entered into and formed a part of every contract for the sale of a lot in the town, by its number or position in the plan, and as having been adopted and confirmed by every conveyance of a lot described by similar reference. It is, in fact, identified with the town itself; and every reference to, or recognition of the town, is a recognition of the plan by which its various divisions and the localities and uses of its different parts are identified. It cannot be doubted that every purchaser of a lot according to the plan, acquired an interest in it not only as evidence of the position of his purchase, but as evidence also of the several advantages and privileges pertaining to the town and the lots, as indicated by the plan, and especially as evidence of the localities, divisions and uses of its various parts as therein presented. Nor can it be doubted that in purchasing and paying for his lot, he purchased and paid for, as appurtenant to it, every advantage, privilege and easement which the plan represents as belonging to it as a part, or to its owner as a citizen of the town, and that a conveyance of each lot with reference to the map, or merely as a part of the town, was a conveyance of all these appurtenances as ascertained by the map which is the basis of the town as such, and identified with it. These conveyances, then, in connection with the map, to which they must be understood as referring, whether expressly or not, and the declaration indorsed by Lytle, that all sales were to be regulated by the map, operate as a conclusive grant or covenant securing to the purchasers and to the town, all advantages, privileges and easements appearing by

the plan to be appurtenant to the lots or the town, and this without any other aid from parol testimony than is always and necessarily admissible in identifying the subjects and fixing the application of written instruments. * * *

"The right which, as we suppose, passes to the purchasers of lots as appurtenant thereto, is not the mere right or privilege that each purchaser may use the streets and other public places according to their appropriate purposes; but the right acquired by each purchaser, that all persons whatever, as their occasions may require or invite, may so use them; or, in other words, we suppose the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers, that the streets and other public places indicated as such upon the plan, shall be forever open to the use of the public, free from claim or interference of the proprietor inconsistent with that use."

OREGON CASES

The principles stated in the Kentucky case were adopted by the Supreme Court of Oregon at an early date and have remained unqualified since.

Carter v. Portland, 4 Or. 339, cites

Rowan's Ex'rs v. Portland, 8 B. Munroe, 232, among other cases, and holds

"(4 Or. 346) We are of opinion that if one owning land, or having an equitable interest therein, subsequently acquires the title thereto, lays out

thereon a town and makes and exhibits a plan thereof with spare ground marked as streets, alleys, public squares or parks, and sells lots with clear reference to that plan or map, the purchasers of the lots acquire as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the town (citing cases)."

Hogue v. Albina, 20 Or. 182 (186) says:

"That the sale and conveyance of lots according to such plan or map implies a grant or covenant that the streets or other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on the faith of which the lots are sold."

Meier v. Portland Ry. Co., 16 Or. 500, says:

"(507) Where, however, a town proprietor lays off his land into town lots, indicates streets upon the plat thereof, and offers the lots for sale, he has a purpose to accomplish by dedicating such streets and that he intends it to be irrevovable is beyond the possibility of a doubt. The proprietor expects, and the purchasers of lots understand, when they purchase, that the streets shown upon the plat will forever remain open to public use. * * * * * * "(16 Or. 510) When a person maps off his land into town lots and offers his lots for sale by reference to the map, there is no mistaking his intention. He designs, if he is honest, that the streets shall belong to the public and that they will be accepted and used by it as such whenever the public necessity or convenience requires it. * * *

The public exigencies requiring the use of the property may not arise for years, but that will not, where

he has induced parties to invest in his scheme, release him from the obligation of his agreement. *His gift is unconditional, and he can never revoke it without the intervention of circumstances rendering it impossible for it to take effect.*" (Italics ours.)

The law thus stated was applied directly to the plats in question in

Steel v. City of Portland, 23 Or. 176.

The court says (per Bean, J.):

"At the argument it was claimed by plaintiff's counsel that neither of the maps or plats was acknowledged in the manner provided by statute, but we regard that question as wholly immaterial in this case because *it has repeatedly been held by this court, and the law is well settled,* that where the owner of land lays out and establishes a town and makes and exhibits a map or plan thereof, with lots, blocks and streets marked thereon, and sells and conveys lots by reference to such plan or map, he thereby dedicates to the public the streets and public places thereon; * * * *The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which the lots are sold* (citing Oregon cases). There is no difference in the principles applicable to the dedication of public streets and public squares or parks; in each case the dedication is to be considered with reference to the use to which the property may be applied or the purpose for which the dedication is made, and this may be ascertained by the designation which the owner gives to land." (Italics ours.)

These principles have never been departed from, but have been reiterated in numbers of Oregon cases. See

Nicholas v. Title & Trust Co., 79 Or. 226; 154 Pac. 391; Ann. Cas. 1917 A, 1149 (1154) (collating Oregon cases).

McCoy v. Thompson, 84 Or. 141 (collating Oregon cases).

A multitude of state and federal authorities supporting this rule is cited in

19 C. J. 928, Sec. 127.

The following federal authorities announce and apply the same rule:

Gormley v. Clark, 134 U. S. 338; 33 L. 909.
Cox v. Hart, 145 U. S. 376; 36 L. 741.
Jeffries v. East Omaha Land Co., 134 U. S. 178; 33 L. 872.
Central Trust Co. v. Hennon (6th C. C. A.), 90 Fed. 593.
Paine v. Consumers Trust Co. (6th C. C. A., per Taft, J.), 71 Fed. 626.
London and S. F. Bank v. Oakland (9th C. C. A., per Hawley, J.), 90 Fed. 691.
Davenport v. Buffington (8th C. C. A., per Sanborn, J.), 97 Fed. 234.

Sandstrom v. O-W. R. & N. Co., 75 Or. 159 (at 164-7) reiterates the rule and sustains it by copious citations from Oregon and elsewhere.

The effect of these decisions is that Oregon has adopted the *unity rule* as stated in

Rowan's Ex'rs v. Portland, 8 B. Munroe 232,

which sustains the doctrine that *all* the rights of way shown by the plat pass as appurtenant to the purchaser of every lot under the plat.

POINT 2

PRIVATE RIGHTS UNDER DEED REFERRING TO PLAT

A lot owner purchasing land and acquiring deed by reference to a plat acquires not only the rights of the general public to the use of the streets shown on the plat, but *he also acquires easements independent of the public easement which in their nature are as indestructible by the acts of the public authorities, or the dedicator, or the grantor or the vendor of the premises as is the estate itself which is the subject of the grant.*

The deed from the Oregon Real Estate Company to Lockwood (Tr. p. 73, plaintiff's Exhibit "G") conveys the lots

> "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,"

and the easements and rights of way shown on the plat are embraced within the grant of the appurtenances.

19 C. J. 933, Sec. 135, says (inter alia):

> "But according to the better opinion if a road

is a public highway the easement so granted survives the extinguishment of the public easement by the discontinuance of the highway by act of law; *for these private easements are independent of the public easement and are in their nature as indestructible by acts of the public authorities or of the grantor of the premises as is the estate itself which is the subject of the grant.*" (Italics ours.)

Van Buren v. Trumbull (Wash.), 92 Wash. 691; 159 Pac. 891; L. R. A. 1917 A p. 1120 (extended note).

Sandstrom v. O-W. R. & N. Co., 75 Or. 159 (165).

Steel v. Portland, 23 Or. 176.

Gormley v. Clark, 134 U. S. 338; 3 L. 909, says:

"The right of way as appurtenant to those blocks and lots passed to the purchasers under the sale upon the trust deed."

Central Trust Co. v. Hennon, 90 Fed. 593, 596.

Paine v. Consumers F. & S. Co., 71 Fed. 226 (628).

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 76.

The cases of

Gormley v. Clark, 134 U. S. 338, and
Stevenson v. Lewis, 264 Ill. 147.

just cited, are instructive.

Gormley v. Clark involved the attempted vacation of streets at Glencoe, Illinois, after the Chicago fire. The right of the individual purchaser of lots to easements

over all those streets, and to enjoin the owner and dedicator from procuring the vacation of those streets and from putting them to any use inconsistent with that granted by the deed and plat, was sustained.

Stevenson v. Lewis, 244 Ill. 147, 91 N. E. 56, arose from Zion City, Illinois, and involved the right of the dedicator to vacate a plat after leasing lots as per plat to individuals. The court says:

> "The effect of this attempted vacation upon the rights of the lessees of lots within the subdivision is the question upon which the case turns."

The court sustained the rights of the lessee as against the dedicator, and used this language:

> "(91 N. E. 59, lower left hand column) If Dowie had the right on October 1, 1901, to vacate Shiloh Park and the portions of streets included in his deed of vacation of that date, regardless of the interests of the lessee, why may not his successors in title vacate now all the streets and alleys in the City of Zion? No lot has been sold, and Dowie's grantee is the sole owner of the fee. Equity will not permit such an injustice, but will enforce, at the suit of individual lessees to whom rights and privileges have been granted by the deeds creating their terms the implied covenant in their leases against any act of the grantor which shall interfere with the free use by the public of the public grounds."

Oregon City v. O. & C. R. Co., 44 Or. 165, announces the rule which sustains our contention that when the Oregon Real Estate Company acquired portions of

Holladay Addition (Tr. pp. 12-14) per recorded plats, and thereafter sold lots based upon the same plat, it thereby ratified, approved and dedicated to the public the streets, alleys and public places shown on the plat as completely and fully as if it had made the plat of dedication.

Christian v. Eugene, 49 Or. 170 (173) says:

> "The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest."

Ann. Cas. 1917 A, p. 1109,

contains an extensive note collating many federal and state cases upon this subject. The author quotes from

Grogan v. Hayward, 4 Fed. 161, 6 Sawyer 498:

> "The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser, and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased."

POINT 3

THIS CASE INVOLVES THE ENFORCEMENT OF THE PURCHASER'S PRIVATE, AS WELL AS HIS PUBLIC, RIGHTS

Under the authorities cited in Point 8 (this brief) the instant case involves the enforcement of the private rights of contract. Appellant's deed (Tr. p. 73, Exhibit "G") is a general warranty with full covenants. The specific lots are conveyed together with their appurtenances, etc., and the deed reads (Tr. p. 74):

> "And the said Oregon Real Estate Company, the grantor above named, does covenant to and with J. B. C. Lockwood, the above named grantee, his heirs and assigns, that the above granted premises are free from all encumbrances, and that it will warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever."

Lockwood paid that company $9000 for the lots with their appurtenances as per plat. He has spent thousands of dollars in building a fine residence upon his lot and in improving and paving the streets; and, after all these years, Oregon Real Estate Company breaches it covenant with him by procuring the City Council to vacate portions of the streets so that it can sell them to the School District.

By these acts the grantor (Oregon Real Estate

Company) has breached its covenants of title, possession and enjoyment in its deed, because

(a) They destroy the appurtenant easements and rights of way of appellant;

(b) They devote the streets to purposes antagonistic to and destructive of the public and private rights of way embraced within the covenant;

(c) They take Lockwood's private property without compensation and without public necessity, without his consent.

The protection and enforcement of Lockwood's private rights are therefore embraced within the bill and are clearly distinguished from the public rights.

> Smith v. Garbe, 86 Neb. 81; 124 N. W. 921; 136 Am. St. 674

says, quoting from

> Jarvis v. Steel Milling Co., 173 Ill. 192; 60 Am. St. 107, 50 N. E. 1044:

> "The question here is not, as assumed by appellant, whether the mill can be operated without the mill pond, but whether the use of the mill pond passed as a necessary appurtenant of the mill property."

So, at bar, the question is not whether Lockwood has means of ingress and egress to his property over streets other than those vacated, but the question is, did Lock-

wood acquire as appurtenant to his property the rights of way and easements over the streets in controversy.

Tooze v. Willamette Valley R. Co., 77 Or. 157, protects by injunction the right of the small owner as against the claim of the railroad company.

Sandstrom v. O-W. R. & N. Co., 75 Or. 159,

protects the property owner in his right to approach his property from both directions, whereas he had ample approach from one direction after the railroad company had closed the other approach.

Nicholas v. Trust Co., 79 Or. 226.
McCoy v. Thompson, 84 Or. 141.
Bostwick v. Hosier, 97 Or. 125, holds (syllabus):

"Owners of lots who purchased their property with reference to a plat, designating certain streets giving access thereto, have a usufruct in the streets which cannot be taken from them for private use by vacating a portion of the streets, regardless of the ownership of the fee in the streets."

"Owners of lots, in blocks adjacent to streets which it was proposed partially to vacate for private use, suffer an injury different from that to the general public, and can prevent such vacation, though no part of the street touching their lots was included in that vacated."

Earll v. Chicago, 136 Ill. 277, 26 N. E. 370, says:

"(26 N. E. 372) That if the owner of land exhibits a map or plan of a town, or addition platted

thereon, and on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever; and such right is not a mere right that the purchaser may use that street, but is a right vesting in the purchasers that all persons may use it—that the sale and conveyance of lots according to the plat implying a grant or covenant to the purchasers of lots and their grantees that the public street indicated upon the plat shall be forever open to the use of the public as a public highway free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use, and that the owner, and all claiming under him, will be perpetually estopped from denying the existence of the streets."

Hall v. Breyfogel (Ind.), 70 N. E. 883, says (syllabus, point 7):

"(70 N. E. 885) The purchaser of a lot in the platted district acquires a vested right in an easement of the street, not only in the street in front of his purchase, but in all the streets of the platted district designated as such on the plat, and the right to have them all kept open."

LaBounty v. Seattle (Wash.), 89 Pac. 480 (at 481) says:

"The authorities are clear to the effect that, where a plat is filed and streets dedicated to the public and accepted, and lots sold with reference thereto, the dedicator cannot afterwards, at his own will, change the plat by vacating a street or any part of one" (citing numerous cases).

Providence Steam Engineering Co. v. Providence, Etc. S. S. Co., 12 R. I. 348, 34 Am. Rep. 652, says:

> "(Syllabus) A riparian owner platted his land into streets, lots and squares, one of such streets being below high water mark; the street was subsequently filled out; but was subsequently closed by the owner of all the adjoining lots; held, that he could be compelled to reopen it by the owner of some of the other lots."

McFarland v. Lindekugel (Wis.), 83 N. W. 757, says:

> "(83 N. W. 758, after discussing the principle of estoppel, quoting from Donohoo v. Murray, 62 Wis. 100, 22 N. W. 167) 'When land is so divided into lots, and a plat made, and the lots and streets marked thereon, and the owner sells a lot so designated on the plat, and for a consideration evidently affected by its situation as a lot on the public street, he is estopped from depriving the purchaser of the use of the street. He, at least, has an easement in such street to be enjoyed in connection with the lot, of which the grantor cannot deprive him, whether the public have an easement therein as a public highway or not.' This rule is of universal application, as will be seen by reference to the following authorities (citing cases). * * * Some few of the cases put the right of the grantee upon the ground that there is an implied covenant to the use of the street, but the great majority, and with the better reason, base it upon the ground of estoppel in pais. * * * *The plaintiff is not seeking to vindicate the rights of the public, but is enforcing an individual right, resulting from the acts of his grantors in platting the property and selling*

lots with reference thereto. In that view, the judgment of the court below was wrong." (Italics ours.)

Archer v. Salinas City (Calif.), 28 Pac. 839, says:

"(841) Whenever the dedication is complete the property thereby becomes public property, and the owner loses all control over it, or right to its use. * * * If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part."

See also

Stevenson v. Lewis, 91 N. E. 56.
Gormley v. Clark, 134 U. S. 338, 33 L. 909.
Central Trust Co. v. Hennon, 90 Fed. 593.
Paine v. Consumers F. & S. Co., 71 Fed. 626 (6 C. C. A., per Taft), says:

"(71 Fed. 628) It is well settled that where a grantor bounds the lot conveyed on a described street and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes, whether it be in fact a street or not (citing authorities), and the same effect is given to a deed describing the lot conveyed by number and reference to an undedicated plat upon which the lot is shown to front upon a street. *In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed.* * * *

The only effect is that as between the grantor and

grantee the latter may do nothing inconsistent with this right. Between them, therefore, it is a street. Nor does it prevent this result that the plat was marked vacated, or that in some of the deeds it was referred to as vacated. *The vacation of the plat affected only the public easement. It did not conflict with the use of the streets as a common way by all the abutting lot owners.*" (Italics ours.)

POINT 4

ESTOPPEL

Because of the unity of relation between the plat and deed and of the vested rights thereby acquired by Lockwood, it seems superfluous to argue that the Oregon Real Estate Company having given Lockwood a warranty deed to his premises with the appurtenant easements, is estopped from breaking its covenants or from doing anything conflicting with the rights for which it has been paid. These appurtenant rights of way and easements were conveyed as effectally by the deed as were the lots themselves, and the Oregon Real Estate Company has no more right to defeat the appurtenant easements than to defeat the conveyance of the estate itself.

19 C. J. 933, Sec. 135.

Christian v. Eugene, 49 Or. 170 (at 173) says:

"The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest."

Oregon City v. Railway Co., 44 Or. 165 (176). Central Trust Co. v. Hennon, 90 Fed. 593, says:

"(90 Fed. 596) The order of the county court in discontinuing the road as a public highway terminated the right of way of the public generally, which depended on the authority and action of the county court for its existence, and also terminated the obligation on the part of the county to maintain the road in a proper state of repair as a public highway. But the order of the county court did not and could not affect the private right of the petitioner to egress and ingress to her property, if such right existed, and could have been asserted against the Trabue heirs. Paine's Ex'x v. Storage Co., 37 U. S. App. 539, 19 C. C. A. 99, and 71 Fed. 626. *The distinction is between a right in the public to use a public highway, depending for its existence on the action of the county court, and a private right of way acquired by grant, contract, or in other valid, legal method, such as by estoppel. But the question of such right, as we have said, was one which was the duty of the court to consider and determine for itself.*"

Steel v. City of Portland, 23 Or. 176 (183) says:

"The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which lots were sold."

That the principle of estoppel applies as against the Oregon Real Estate Company is settled in

McFarland v. Lindekugel (Wis.), 83 N. W. 757 (758) collating cases.
Gormley v. Clark, 134 U. S. 338; 33 L. 909.
Extended note, Jacobson Pharmacy Co. v. Luckie, Ann. Cas. 1917 A, p. 1105 (1107) collating cases.
See authorities this brief under Points 2, 3, and 8.

POINT 5

EQUITABLE JURISDICTION—INJUNCTION—MANDATORY INJUNCTION

The lower court denied jurisdiction in equity to protect these easements thus acquired. In this he committed plain error. Equity has jurisdiction to protect vested estates, and, in cases of this character, to issue injunctions or such other writs as are necessary to effectuate substantial justice.

Tooze v. Willamette Ry. Co., 77 Or. 158.
Nicholas v. Title & Trust Co., 79 Or. 226.
Bostwick v. Hosier, 97 Or. 125.
Meier v. Portland, Etc. Ry. Co., 16 Or. 500 (505).
Oregon City v. O. C. Ry. Co., 44 Or. 165 (179).
Stevenson v. Lewis (Ill.), 91 N. E. 56.
Gormley v. Clark, 134 U. S. 338.
Morse v. Whitcomb, 54 Or. 412.
19 C. J. 992, Sec. 253, also p. 996, Sec. 258.

POINT 6

VACATION PROCEEDINGS VOID—NO PUBLIC NECESSITY OR USE SHOWN—ESTOPPEL—CONDEMNATION PROCEEDINGS EVADED

Recapitulating, the facts show that,

(a) By deed dated June 19, 1872, Oregon Real Estate Company acquired a vast amount of property in Holladay's Addition, including all the properties in question (Tr. pp. 12-14); that company's charter powers enabled it to transact a general real estate business (Tr. pp. 9, 10), complaint par. IV), After it acquired title by deed as stated, it sold divers and sundry lots, parcels of land and blocks to various persons and described such property by reference to the plats in controversy (Tr. pp. 20, 21, complaint, allegation XII). During all this time the streets shown on the plat were in existence, were public streets, were dedicated, used and maintained as public thoroughfares, were in good condition and were much traveled.

The proceedings for vacation were signed by appellees, Oregon Real Estate Company, and School District No. 1, for Clackamas street (Tr. pp. 46-49) and by appellees, Oregon Real Estate Company and School District No. 1, together with Fred Jennings, for East 8th street.

The plats demonstrate that when the consent of the Oregon Real Estate Company for the vacation of such

streets is stricken from the petitions, then clearly the amount of property and number of property holders required by the charter as a basis for proceedings to vacate, do not exist. (Charter provisions, Tr. pp. 28-30, allegation XV.)

Appellant urges

MAJOR PREMISE

(1) A grantor in a warranty deed is estopped from doing anything conflicting with, destructive of, or tending to defeat the effect of the deed.

MINOR PREMISE

(2) When the Oregon Real Estate Company sought to procure the vacation of these streets, so that it might sell them to the School District, it was then promoting proceedings which conflicted with and were destructive of the interests of its grantee; and,

CONCLUSION

(3) Therefore, it is estopped to join in the proceedings for vacation.

It could no more join in proceedings to vacate these streets without payment for the private easements and rights of way than it could defeat the title to the lots themselves by similar proceedings.

19 C. J. 931, Sec. 130..

Authorities, supra.

Its name as a consenting owner should, therefore, be stricken from the proceedings for vacation; and when this is done the proceedings fall.

(b) The ordinances passed at the instigation of Oregon Real Estate Company and the School District, seek to destroy the easements of lot purchasers under the plat to Holladay's Addition, to enable the Real Estate Company to devote appellant's property to private uses, without compensation.

This we submit is violative of the equality and due process clauses of Article XIV, Sec. 1 of the contract clause of the Federal Constitution.

Penn. Coal Co. v. Mahon, 43 S. C. (U. S.) 158.
Published January 15, 1923.
Smith v. Cameron (Ore.) 210 Pac. 716.

(c) The involved easements are property; they cannot be taken by the method attempted; they can only be taken by condemnation proceedings under Article I, Sec. 18, Article XI, Sec. 4, Oregon Constitution, and Or. Laws, Section 7108 et seq.

Tooze v. Willamette Valley So. Ry., 77 Or. 157, at 162.
Bostwick v. Hosier, 97 Or. 125.

(d) Neither petition shows any public necessity for the vacation of either street.

The complaint shows that the street is fulfilling its

functions within the meaning of the charter (Sec. 8, Tr. p. 25) reading:

> "A street shall be held to fulfill its function as a street by being used in any way for the purpose of travel, transportation or distribution by or for the public."

The complaint also shows that the street is hard surfaced, is in good repair, is much used by the public, by petitioner and the residents of Holladay Addition generally; that the streets are not dangerous, are not abandoned; that the city has money with which to keep them in repair, etc.

The requisites for a petition for vacation specified in the charter are (inter alia) (Tr. p. 29):

> "The peitition, so to be presented to the Council shall set forth a description of the part of the street proposed or sought to be vacated, and the purpose for which the ground is proposed to be used, *and the reason for such vacation.*"

This of course means that there must be a public necessity or a public reason for the vacation itself.

> 37 Cyc. 179.
> McQuillan Municipal Corporations, Vol. 3, Sec. 1403, p. 2985.

These petitions both show, with appropriate changes in description (Tr. 44-45):

> "That the purpose for which the ground is proposed to be used which your petitioner herein seeks

to have vacated is for general private purposes the same as the adjacent ground, and particularly for residential purposes and school purposes. That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property * * * the said School District contemplates the purchase of blocks 96, 97 and 98 of Holladay Addition and on which the proposed new Holladay School is to be located and the vacation of that portion of said street will add to and be beneficial to the public in connection with said school."

The entire vacation proceedings are, as we submit, but a short cut taken to avoid condemnation proceedings as no public necessity exists therefor; and, hence, are void.

Penn. Coal Co. v. Mahon, 43 S. C. 158 (U. S. Supreme) (January 15, 1923.)

Furthermore they are void for conflict with the Oregon Constitution.

Article I, Sec. 18; Article XI, Sec. 4, Oregon Constitution.
Tooze v. Willamette Valley R. Co., 77 Or. 157.
Pac. Lumber Co. v. Portland, 65 Or. 349. Point 18.
Bostwick v. Hosier, 97 Or. 125.

(e) By checking the property ownership on 8th street it will be found that sufficient property owners did not sign either by number or by frontage ownership, and the charter provisions was not complied with.

POINT 7

DISMISSAL OF SUIT IN EQUITY

The lower court held that plaintiff's remedy, if any, was in damages. He thereupon dismissed the suit and did not transfer it to the equity side.

This is contrary to the plain provisions of

> Federal Equity Rule 22; annotated in Hopkins Federal Equity Rules, 3rd Ed., pp. 162-4 (collating cases).

For all these reasons we respectfully submit the decree should be reversed, and one directed quieting plaintiff's title to his easements, compelling appellees to desist from destroying the easements or streets shown on the plat, to restore such streets to their former condition, and granting such other relief as is meet.

Respectfully submitted,

ISHAM N. SMITH,
418 Mohawk Bldg., Portland, Ore.,
Attorney for Appellant.

Service accepted at Portland, Ore., this..... day of January, 1923.

.....
Attorney for Appellee City and its Officers.

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Attorney for Appellee School District and its Officers.